

No. 83-1864

IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
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October Term, 1983

RICHARD THORNBURGH, et al.,

Petitioners

v.

MARTIN NELSON, et al.,

Respondents

On Petition For Writ of Certiorari To
The United States Court of Appeals For
The Third Circuit

PETITIONERS' REPLY BRIEF

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1. Respondents attempt to characterize the district court's order requiring petitioners to provide respondents (and the class they represent) with personal readers as a wholly factual determination

not deserving of the Court's review. (Br. in Opp., 5-7). But respondents' own submission belies their portrayal of the issue before the Court.

Respondents argue (Br. in Opp., 6) that the district court merely applied the "undue burden" standard prescribed by federal regulations, 45 C.F.R. §84.12(c)(1983), but they totally ignore petitioners' primary contention (Pet. 8-11) that the regulations impose obligations on recipients of federal funds far beyond the requirements of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. Respondents' contention (Br. in Opp., 6) that the Court reviewed and approved the regulations in Consolidated Rail Corp. v. Darrone, No. 82-862 (February 28, 1984), is nothing short of ludicrous. Darrone addressed no question regarding the validity of administrative

regulations; the Court merely referred to contemporaneous agency regulations - together with the language of Section 504, the legislative history, and the purpose of the statute - to support its conclusion that Section 504 applied to all federally-funded programs, not merely those designed to promote employment. Slip op. at 9-10.

Rather than raising factual questions, which petitioners agree rarely merit this Court's attention, this case raises serious and far-reaching legal questions regarding application of Section 504. This Court recently reiterated "that §504 does not require affirmative action on behalf of handicapped persons, but only the absence of discrimination against those persons." Smith v. Robinson, No. 82-2120 (July 5, 1984), slip op. at 24. Because, as a matter of law, the

district court's judgment, and the regulations upon which the court relied, go beyond the requirements of Section 504, this Court should grant the writ of certiorari and, upon review, reverse the decision below. *

2. Respondents argue (Br. in Opp., 8) that "[t]here can be no doubt that federal courts have jurisdiction to enforce prospectively a federal statute [against the States]." Despite their confidence, respondents offer no support for their "black letter" statement. More importantly, they ignore entirely this Court's specific reservation of the question in Pennhurst State School and Hospital v. Halderman, No. 81-2101 (January 23, 1984), slip op. at 13, n.25. Clearly, the question is one deserving of this Court's attention.

Finally, respondents contend (Br. in Opp., 8) that this case is an

inappropriate one for resolving the Eleventh Amendment question because it is, in their view, unclear whether Section 504 is a spending power statute or one passed to enforce the Fourteenth Amendment. This argument proves too much. If that question is, indeed, unsettled, it can only further justify this Court's review.

CONCLUSION

The petition for writ of
certiorari should be granted.

Respectfully submitted,

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